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COMMISSIONER

**TESTIMONY OF
GERALD REID, COMMISSIONER**

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

SPEAKING IN SUPPORT OF L.D. 1775

AN ACT TO PROTECT SUSTENANCE FISHING

SPONSORED BY REP. GIDEON

**BEFORE THE JOINT STANDING COMMITTEE
ON
ENVIRONMENT AND NATURAL RESOURCES**

DATE OF HEARING:

MAY 29, 2019

Chairman Carson, Chairman Tucker, members of the Committee, it is my pleasure to be here today to offer this testimony in support of L.D. 1775, which would protect water quality needed for sustenance fishing in certain waters.

Several years ago, a dispute arose among the State of Maine, the U.S. EPA, the Penobscot Nation and the Houlton Band of Maliseet Indians related to

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sustenance fishing and the regulation of water quality. The parties disagreed on the rights and authority that each held under provisions of the Maine Indian Land Claims Settlement Acts and the Clean Water Act. Eventually the EPA disapproved certain water quality standards and adopted a federal regulation containing new water quality standards that it determined were necessary to protect tribal sustenance fishing in waters within and adjacent to Indian Territory in Maine. The State challenged EPA's disapprovals in court on jurisdictional and procedural grounds, and the Penobscot Nation and Houlton Band of Maliseet Indians intervened. That lawsuit is still pending but is currently stayed.

In February of this year, the four parties to that litigation, together with the Passamaquoddy Tribe and the Aroostook Band of Micmacs, began discussing how to break the impasse. The idea was to come to an agreement on what water quality standards were appropriate and where they should apply, but not require any of the parties to give up their positions on the legal and jurisdictional positions that had formed the basis of the dispute. In other words, we wanted to find a way to put aside the legal arguments and move ahead to accomplish something important. This bill is the product of those negotiations.

The bill does three major things. First, it establishes a new designated use of sustenance fishing in Maine's Water Classification Law. In order to avoid potential confusion about the meaning and effect of this new designated use, the bill carefully limits and defines the term. Specifically, it provides that the sustenance fishing designated use is deemed protected for all purposes

through water quality criteria for human health that are derived using a fish consumption rate of 200 grams per day, and a cancer risk rate of one in 1,000,000 for toxic pollutants other than inorganic arsenic, which is treated differently under Maine law. The bill does not change how mercury in discharges is regulated, because mercury, like inorganic arsenic, is also subject to its own unique statutory provisions, and is present in Maine waters largely as a result of air deposition from out of state sources. The bill directs DEP to adopt the required water quality criteria by March 1, 2020 through routine technical rulemaking.

Typically, a fish consumption rate would be based on data showing the actual rate of consumption of fish from specific waters that is occurring. In the current context, we concluded that methodology did not make sense, because Tribal members are not consuming the levels of fish that they would in the absence of concerns about the health effects of toxic contamination. We decided that under these unique circumstances the fish consumption rate should be set as matter of public policy, through the legislative process. EPA has national guidelines that consider a fish consumption rate of 142 grams per day as protective of sustenance fishing, and the States of Oregon and Washington have adopted fish consumption rates of 175 grams per day for this purpose. Our proposed rate of 200 grams per day was a conscious choice to establish in Maine the most protective fish consumption rate in the country for those select waters where we believe it is appropriate. We looked carefully at potential impacts to the regulated community from the adoption of a 200 gram per day fish consumption rate and determined them to be minimal to non-existent.

Second, the bill specifically identifies and lists those waterbodies to which the new designated use will apply. The Tribes identified these waterbodies as having particular significance to their communities for the purpose of fishing. There is not necessarily any connection between the chosen waterbodies and the Tribes' Reservations or Territories. To be clear, the waterbodies where these new water quality standards will apply are open to fishing by Tribal and non-Tribal members alike, so all Maine citizens will benefit from their protections. Attached to my testimony are a series of maps that depict the covered waters, both collectively and as requested by each of the four Tribes.

Third, the bill amends the ambient water quality criteria that establish the level of mercury that is considered safe for human health. Specifically, it adjusts the fish tissue residue criterion, for the identified waters, from 0.20 to 0.03 milligrams per kilogram to reflect the more protective 200 grams per day fish consumption rate.

If this bill is enacted in its current form, I expect that it will be approved by EPA and allow for the settlement of the lawsuit still pending in federal court. I should emphasize that enactment in its current form is particularly important here, because even well-intentioned amendments run the risk of upsetting the six-party agreement that this bill language reflects.

Having said that, it is likely that certain technical amendments to the bill language will be necessary to reconcile L.D. 1775 with provisions in L.D.

1743, *An Act To Reclassify Certain Waters Of The State*. The Committee's analyst, Dan Tartakoff, is aware of this issue. DEP recommends that, assuming such amendments are made, the Committee also replace the current bill summary with the full version of the six parties' original, negotiated summary of this proposed legislation. This summary, with some minor corrections from the Revisor's Office, is attached to my testimony. Including that negotiated summary would be very helpful in memorializing and explaining the six parties' agreement and shared understanding of the intent, effect, and limits of this bill through the legislative process.

I want to thank the Chiefs and Natural Resources staffs of the four Tribes for their collaboration and patience with the process. This bill, together with L.D. 1743 (the Reclassification bill) are examples of how the State and the Tribes can work together constructively to address important issues of common concern, in this case improving water quality. It is a way to begin rebuilding trust and goodwill following years of disagreements and litigation, and I look forward to continuing to work with the Tribes on other similar projects.

Thank you and I would be happy to answer any questions you may have.

Attachment

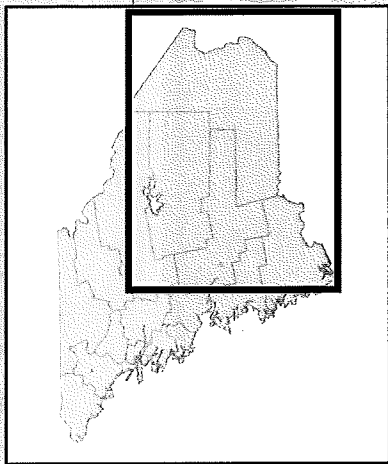
SUMMARY

This bill creates a sustenance fishing designated use as a subcategory of the applicable fishing designated use for certain specified water body segments within Maine's water classification program, Maine Revised Statutes, Title 38, chapter 3, subchapter 1, article 4-A, where there is or may be sustenance fishing or increased fish consumption by members of the Indian tribes in Maine or other Maine citizens. This bill also requires that the Department of Environmental Protection adopt routine technical rules no later than March 1, 2020 that calculate and establish water quality criteria protective of human health for toxic pollutants and the sustenance fishing designated use as established by this bill. This bill limits the scope of the sustenance fishing designated use created by this bill by providing that, for all purposes, including for purposes of the State's water classification program, the federal Clean Water Act, and related regulations and guidance, the sustenance fishing designated use created by this bill is deemed protected through water quality criteria for human health calculated and established for the identified water body segments using, in addition to the other assumptions used in developing human health criteria generally under the Maine Revised Statutes, Title 38 section 420, subsection 2 and rules adopted by the Department of Environmental Protection, a fish consumption rate of 200 grams per day and a cancer risk level, except for inorganic arsenic which is governed by Title 38 section 420, subsection 2, paragraph J, of one in 1,000,000. The designation in this bill of specific waters subject to a sustenance fishing designated use is not intended to preclude a future designation of other such waters through a similar legislative process or as otherwise provided for by law.

All aspects of this bill, including the sustenance fishing designated use and the identification of specific water body segments subject to that use, are intended to have meaning and effect within the State's water classification program only and for purposes of calculating and establishing water quality criteria for human health enough to protect the sustenance fishing designated use only. Nothing in this bill or the sustenance fishing designated use it establishes is intended to apply to or affect discharges of mercury, which are governed exclusively by separate provisions of law, including the Maine Revised Statutes, Title 38 section 420, subsection 1-B and section 413, subsection 11. This bill changes the human health ambient criterion specified in the Maine Revised Statutes, Title 38, section 420, subsection 1-B, paragraph A, subparagraph (2) to reflect the 200 grams per day fish consumption rate that the Department of Environmental Protection is directed to use when deriving human health criteria for toxic pollutants to protect the sustenance fishing designated use, but this change is not intended to affect the mercury discharge limits set forth in Title 38, section 420, subsection 1-B and section 413, subsection 11. Nothing in this bill is intended to alter or affect in any way any provision of any of the State's state and federal Indian

settlement acts, including the state Indian settlement acts in the Maine Revised Statutes, Title 30, chapters 601 and 603. No part of this bill is intended to relate to or affect in any way any claims or disputes regarding any definition of Indian country, territory, lands, waters, reservations, or rights of any kind under any other provision of state or federal law. No part of this bill is intended to create or limit any right or protection under any other state or federal law, including the federal Clean Water Act except as described in this section or any state or federal Indian settlement law or act, or create in any way a right to any particular quantity or quality of fish. The sole intent of this bill is to create a sustenance fishing designated use that is deemed protected for all purposes through water quality criteria for human health calculated and established, through routine technical rulemaking, using a specific minimum fish consumption rate and specified cancer risk levels for the waters expressly identified in the State's water classification program, which criteria are applicable for purposes of the State's water classification program and the federal Clean Water Act.

Sustenance Fishing Waters (Final 5/22/2019)



Tribal Lands

Sustenance Fishing Waters

Tribe



Maliseet



Micmac



Passamaquoddy



Penobscot



Lakes



Tidal Waters



Maine Counties

0 10 20
Miles

Aroostook

Edmundston

Caribou

Bulleton

Millinocket

Penobscot

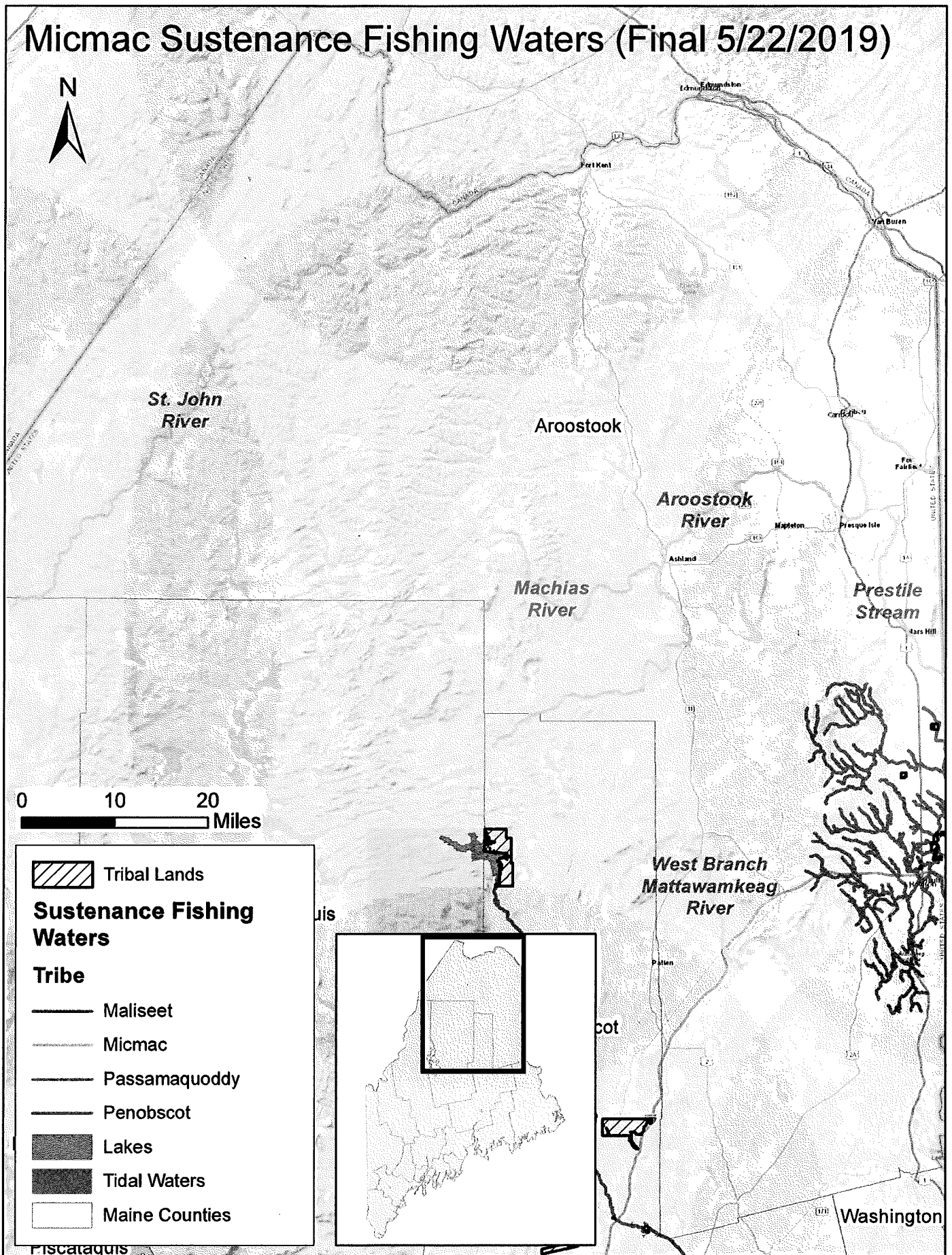
Lincoln

Hancock

Washington

CANADA

Micmac Sustenance Fishing Waters (Final 5/22/2019)



Maliseet Sustenance Fishing Waters (Final 5/22/2019)



T4 R4 WELS

T9 R3 WELS

TD R2 WELS

Number Nine Stream

North Branch
Meduxnekeag River
Tributaries

Bridgewater
Bridgewater

Centerville

Saint
Croix Twp

T8 R3 WELS

South Brook

North Branch
Meduxnekeag River

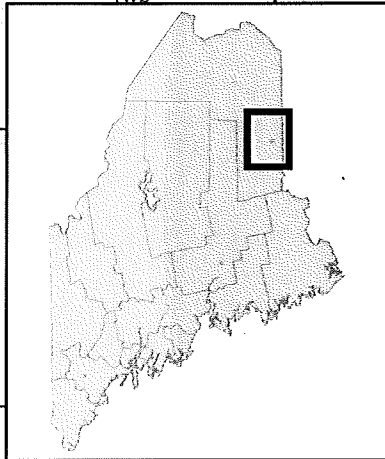
Dead Stream

Monticello
Monticello

Croft
Lake

Howard Brook

0 3.5 7 Miles
Dudley Twp



Smyrna

Hammond

Captain
Ambrose
Bear Stream

Big
Brook

Littleton

Mill Brook

Meduxnekeag
Tributaries

Ludlow

Houlton
Houlton

New Limerick
New Limerick

Meduxnekeag
River

UNITED STATES

CANADA



Tribal Lands

Sustenance Fishing Waters

Tribe

- Maliseet
- Micmac
- Passamaquoddy
- Penobscot



Lakes



Tidal Waters



Towns

field

WELS

WELS

Linneus

Sargent Rd

Hodgdon

Meduxnekeag
Tributaries

Cary-Plt

TA R2 WELS

Forkstown Twp

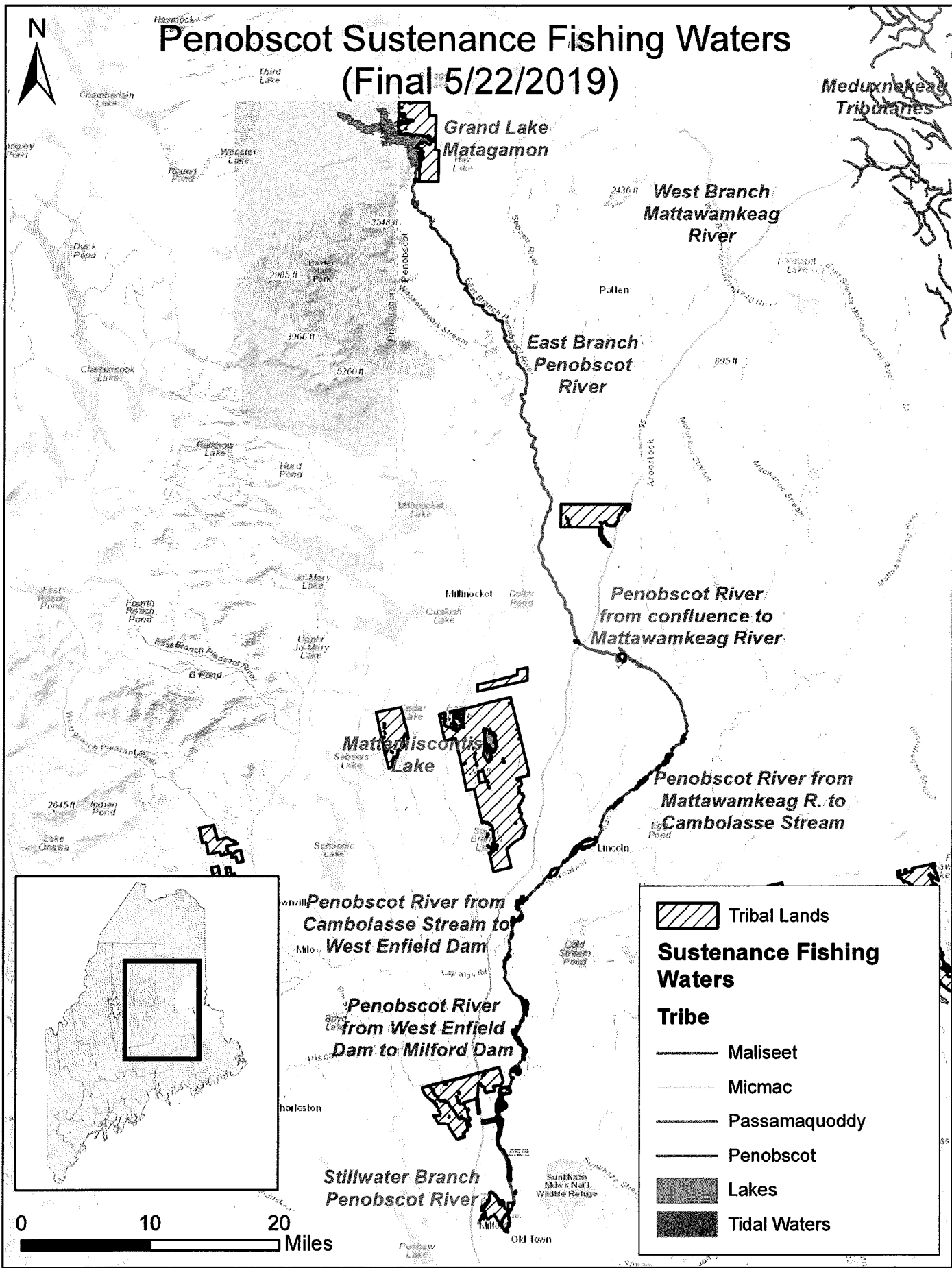
Amity

Kirkland

Bullock

95 R

Penobscot Sustenance Fishing Waters (Final 5/22/2019)



Tribal Lands

Sustenance Fishing Waters

Tribe

Maliseet

Micmac

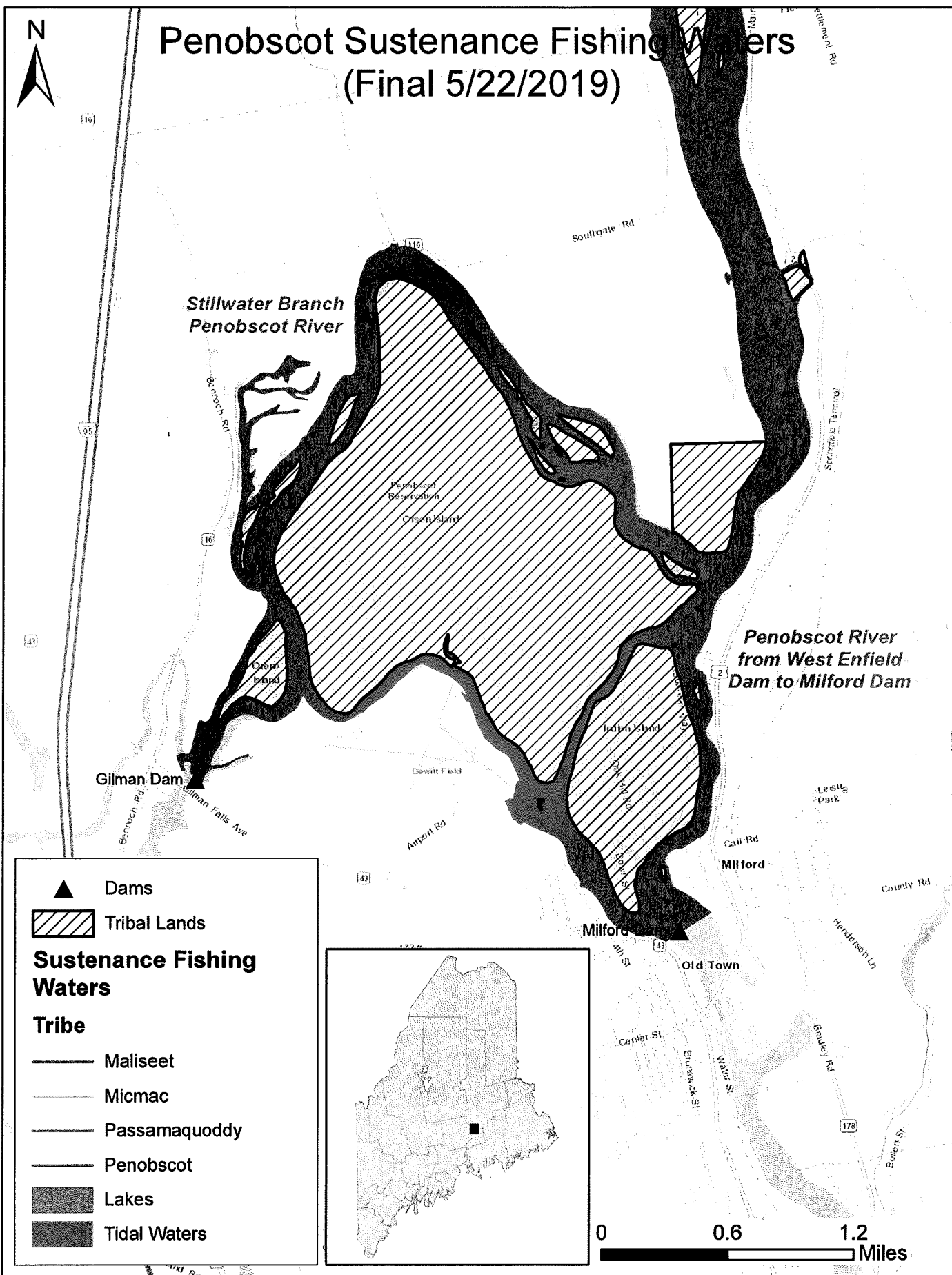
Passamaquoddy

Penobscot

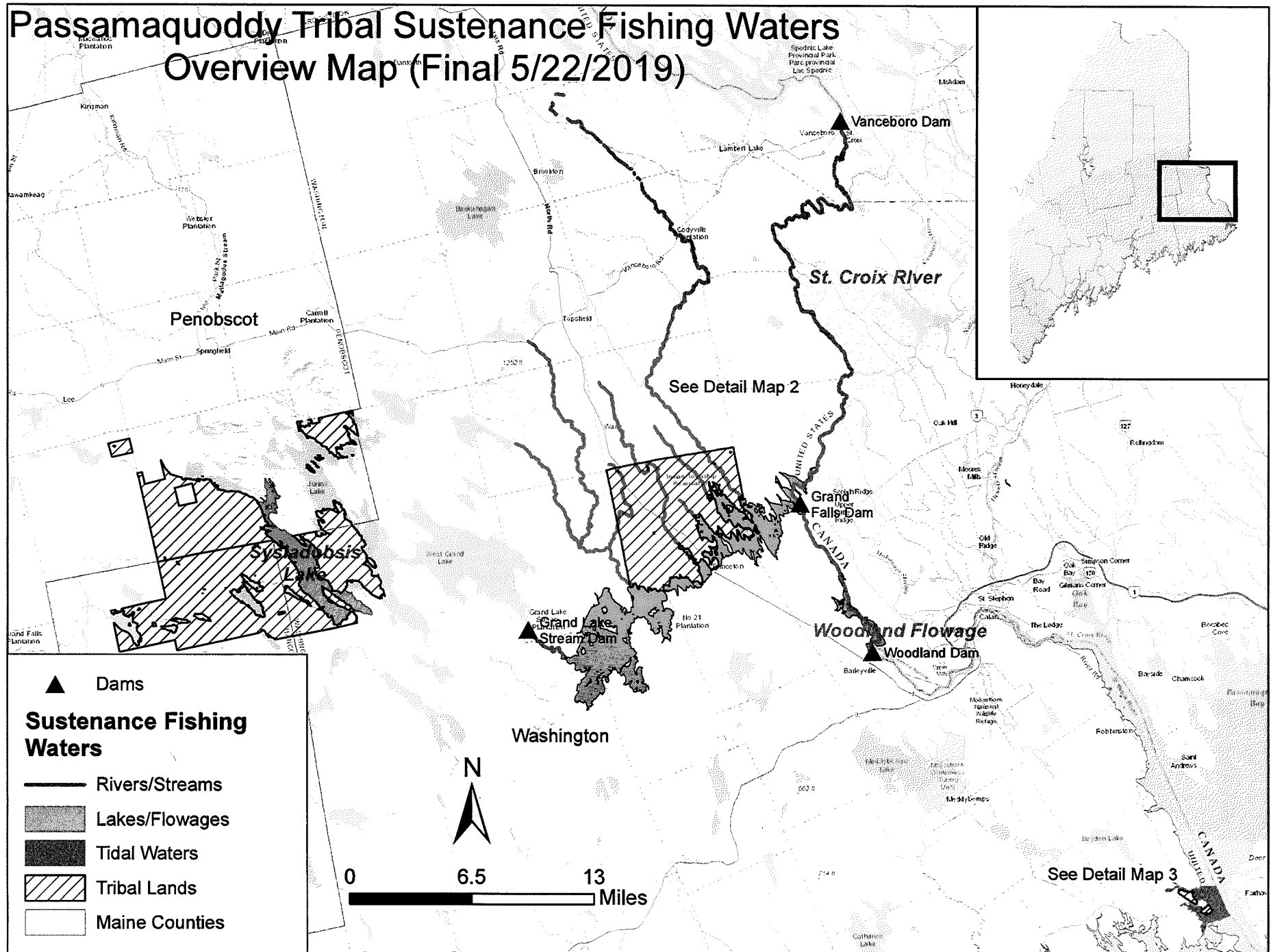
Lakes

Tidal Waters

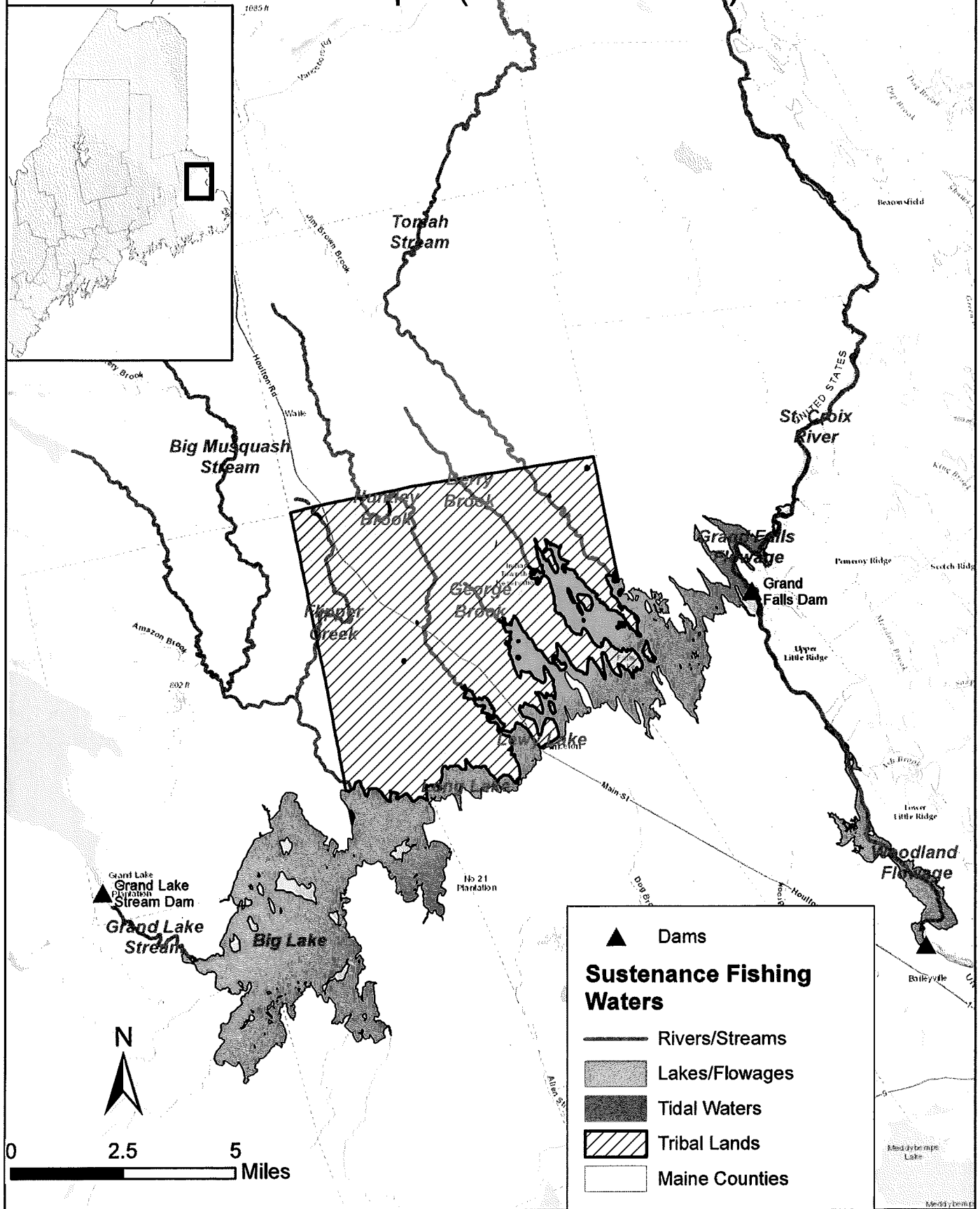
Penobscot Sustenance Fishing Waters (Final 5/22/2019)



Passamaquoddy Tribal Sustenance Fishing Waters Overview Map (Final 5/22/2019)



Passamaquoddy Tribal Sustainance Fishing Waters Detail Map 2 (Final 5/22/2019)



Passamaquoddy Tribal Sustenance Fishing Waters Detail Map 3 (Final 5/22/2019)

